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March 1, 2006

REDACTED FOR PUBLIC INSPECTION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: WT DOCKET NO. 05-339

Dear Ms. Dortch:

On behalf of United States Cellular Corporation ("USCC") and in accordance with the instructions in the Protective Order in the above-referenced docket, herewith transmitted is a copy of the redacted version of USCC's "Reply" in the above- referenced docket.

In the event there are questions concerning this matter, please communicate with the undersigned.

Very truly yours,



Peter M. Connolly

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Applications of)	WT Docket No. 05-339
Midwest Wireless Holdings, L.L.C.)	
And ALLTEL Communications, Inc.)	
)	
For Consent for Transfer)	
Of Control of Licenses)	
And Authorizations)	
)	
File No. 0002391997)	

UNITED STATES CELLULAR CORPORATION
REPLY TO JOINT OPPOSITION

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REPLY TO JOINT OPPOSITION

The Joint Opposition¹ filed in this docket by ALLTEL Communications, Inc. (“ALLTEL”) and Midwest Wireless Holdings, L.L.C. (“Midwest”) is an extraordinary document.

In their Joint Opposition, ALLTEL and Midwest announce that they are taking steps that can only be interpreted as a concession that ALLTEL’s proposed acquisition of Midwest would be anticompetitive in southern Minnesota and inconsistent with the public interest. Oddly, even as they make this concession, ALLTEL and Midwest continue to insist that “claims of possible anticompetitive effects resulting from the proposed acquisition ... must be rejected.”²

ALLTEL and Midwest then assert without support that the Commission must accept these steps—without analysis and wherever they may lead—as a remedy for the anticompetitive

¹ ALLTEL Communications, Inc. and Midwest Wireless Holdings, L.L.C., Joint Opposition to Petition to Deny, *Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc. For Consent for Transfer of Control of Licenses and Authorizations*, WT Dkt. No. 05-339 (Feb. 17, 2006) (“Joint Opposition”).

² Joint Opposition at 4.

effects in southern Minnesota and “promptly grant the Transfer Applications.”³ At the same time, however, ALLTEL and Midwest make factual assertions that raise doubts about whether there is any remedy that would be adequate to save the proposed transaction.

Finally, ALLTEL and Midwest attempt to “shoot the messenger,” criticizing United States Cellular Corporation (“USCC”) for stating the obvious in its Petition to Deny—that ALLTEL’s proposed acquisition of Midwest is anticompetitive in southern Minnesota. According to ALLTEL and Midwest, USCC’s Petition to Deny is “factually flawed” and “erroneous,” and it is motivated alternatively by a “concern about strengthened competition” from ALLTEL and a desire to use the Commission’s process to advance USCC’s private interests.⁴

The Commission should not allow itself to be diverted by such tactics. By their actions, ALLTEL and Midwest effectively concede that their proposed transaction is anticompetitive. The question now before the Commission is whether there exists an effective remedy—one that would “preserve and enhance competition” in affected markets—so that the Commission may permit the transaction to proceed. If there is such a remedy, what is it? And by what process should an appropriate remedy be determined?

The remedy proposed by ALLTEL and Midwest in their Joint Opposition is clearly inadequate, and it remains unclear that there is any remedy that would be sufficient. The Joint Opposition filed by ALLTEL and Midwest proves only that “substantial and material questions of fact” now exist as to whether this transaction is in the public interest, and that the Commission

³ Joint Opposition at 2.

⁴ Joint Opposition at 2-4 & 6.

must hold a hearing pursuant to Section 309(e) of the Communications Act to determine whether it can make the necessary public interest determination.⁵

INTRODUCTION AND SUMMARY

The Commission approaches its public interest determinations concerning proposed transactions with a “deeply rooted preference for preserving and enhancing competition in relevant markets.”⁶ To be in the public interest, a transaction must either meet this criteria as it was first proposed to the Commission, or as altered by any necessary conditions imposed by the Commission.

Applying these basic principles to ALLTEL’s proposed acquisition of Midwest, the Commission should determine first whether the transaction is anticompetitive in any relevant market. If so, the Commission should then determine whether there is any way that the Commission can condition its approval for the transaction so that, as modified, the transaction would “preserve or enhance” competition. If there is a remedy that would achieve this goal, such as [REDACTED], the Commission may approve the transaction, subject to compliance with remedial conditions. If not, then the transaction is not in the public interest and the Commission should withhold its approval.

In making these judgments concerning ALLTEL’s proposed acquisition of Midwest, the Commission may draw upon its own lengthy experience with [REDACTED] remedies. In addition, however, the Commission may draw upon the lengthy experiences the Department of Justice and the Federal Trade Commission have had with such issues in enforcing the antitrust laws, and

⁵ 47 U.S.C. § 309(e). See *Astroline Communications v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988).

⁶ Application of ALLTEL Corp. and Western Wireless Corp., *Memorandum Opinion and Order*, 20 FCC Rcd. 13053 (2005) (“*ALLTEL-Western Wireless Order*”), at ¶ 19.

upon the policy statements those agencies have developed concerning merger remedies, based on their lengthy experience.⁷ In these policy statements, the antitrust agencies provide detailed guidance concerning the goals of merger remedies in general, and [REDACTED] [REDACTED] in order to achieve those goals most effectively.

From the policy statements published by the antitrust agencies, it is clear that their goals in designing merger remedies closely parallel the goals articulated by the Commission. For the FTC, the goal is to “preserve fully the existing competition in the relevant market or markets.”⁸ At the Department of Justice, the Antitrust Division will “insist upon relief sufficient to restore competitive conditions the merger would remove.”⁹ As expressed by a former Director of the FTC’s Bureau of Competition, “[c]onsumers should benefit from the same degree of competition after a merger as before a merger.”¹⁰

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹²

⁷ U.S. Department of Justice, Antitrust Division, “Antitrust Division Policy Guide to Merger Remedies” (October 2004) (“DOJ Policy”); Federal Trade Commission, Bureau of Competition, “Frequently Asked Questions about Merger Consent Order Provisions” (undated) (“FTC Policy”). The policy statements may be found at <http://www.usdoj.gov/atr/public/guidelines/205108.htm> and <http://www.ftc.gov/bc/mergerfaq.htm>.

⁸ FTC Policy at Q.1.

⁹ DOJ Policy at 4. Indeed, the Supreme Court has stressed repeatedly that the purpose of an antitrust remedy is to protect or restore competition. *See Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

¹⁰ Richard Parker and David Balto, “The Evolving Approach to Merger Remedies,” *Antitrust Report* at 4 (May 2000).

¹¹ [REDACTED]

¹² [REDACTED]

The Commission's evolving approach to [REDACTED] remedies should build upon the experiences and policy statements of the antitrust agencies. Note that if anything, the Commission's goal to "preserve and enhance" competition is broader than the agencies' goal to "preserve fully the existing competition." And the Commission has every reason to accept and build upon the agencies' practical experiences and advice in relation to [REDACTED]. Indeed, the Commission has frequently observed that its remedial authority is as broad or even broader than the comparable authority of antitrust enforcement agencies.¹³

Applying these principles, the Commission should conduct further fact-finding to determine whether ALLTEL's proposed acquisition of Midwest can be approved at all.

In announcing that [REDACTED], ALLTEL and Midwest effectively concede that their proposed transaction is anticompetitive and cannot be approved by the Commission in its present form. Even if the announcement by ALLTEL and Midwest is not taken as a concession, their arguments fail to overcome the presumption of anticompetitive harm that is associated with the extraordinary post-transaction market shares and market concentration statistics this transaction would produce.

Is there an effective remedy for these anticompetitive effects? We can't tell. The unilaterally advanced, "trust us" remedy proposed by ALLTEL and Midwest is clearly inadequate under the standards articulated by the Commission and the antitrust agencies. It is described only in outline form. It is far from certain to be effectuated. Further, by design, it

[REDACTED]

[REDACTED]

¹³ *ALLTEL-Western Wireless Order*, at ¶ 21 ("[U]nlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the merger will yield overall public interest benefits.").

[REDACTED]. For this reason, it is a far more inferior remedy than the one the Commission and the Department of Justice imposed only a few months ago to remedy the anticompetitive effects of ALLTEL's acquisition of Western Wireless Corp.

Further, in their Joint Opposition, ALLTEL and Midwest make factual assertions that raise doubts about whether there is any way to modify this proposed transaction to ensure that it would preserve and enhance competition. While USCC recommended initially that the Commission consider requiring a divestiture of Midwest Wireless Communications, L.L.C., the Midwest entity that owns Midwest's cellular business in southern Minnesota, it is now far from clear that this divestiture alone would be sufficient. A far greater divestiture would be required, if indeed, the Commission can approve this proposed transaction at all.

DISCUSSION

1. **ALLTEL and Midwest Effectively Concede That Their Proposed Transaction Would Have Anticompetitive Effects in Southern Minnesota.**

In their Joint Opposition, ALLTEL and Midwest announce for the first time that

[REDACTED]
[REDACTED] in the five Minnesota RSAs where the ALLTEL and Midwest Wireless service areas overlap."¹⁴ [REDACTED]

[REDACTED].
ALLTEL and Midwest would have the Commission believe that [REDACTED]
[REDACTED]

¹⁴ Joint Opposition at 1-2.

It is none of these things. ALLTEL and Midwest know very well that the Commission cannot approve ALLTEL's acquisition of Midwest in the form that they proposed this transaction to the Commission. The proposed transaction would have anticompetitive effects in southern Minnesota, and if it is to go forward at all, an effective remedy would be required. By their actions, ALLTEL and Midwest now concede as much.¹⁵

To resist this obvious inference, ALLTEL and Midwest devote the vast majority of their Joint Opposition to arguing that the transaction they proposed to the Commission would not in fact be anticompetitive. They do not once take issue, however, with the data presented by USCC showing that the proposed transaction would create a combined company with market shares in the range of 70% to 95% in southern Minnesota, and that the transaction would increase the Herfindahl-Hirschman Index by some 1000 to 3500 points to a post-transaction level in the range of 5400 to 8500.¹⁶ Rather, ALLTEL and Midwest argue that "customer share data is not dispositive."¹⁷

¹⁵ Note that in proposing [REDACTED] in "the five Minnesota RSAs where the ALLTEL and Midwest Wireless services areas overlap," ALLTEL and Midwest concede not only that their proposed transaction would be anticompetitive in Minnesota RSAs 7, 8, 9, and 10, where ALLTEL holds the A-side cellular license, but also Minnesota RSA 11 where Great Western L.L.C. holds this license, not ALLTEL. In Minnesota RSA 11, ALLTEL holds a 49% interest in Great Western, with an option to acquire the remaining interest, and a spectrum management lease. In USCC's Petition to Deny, WT Dkt. No 05-339 (Jan. 30, 2006) ("Petition to Deny") at 11-12, USCC argued that the Commission should treat Minnesota RSA 11 in parallel with the other affected RSAs, and ALLTEL and Midwest now apparently agree with this approach.

¹⁶ Petition to Deny at 14. Note that even if it is true, as ALLTEL and Midwest assert, that [REDACTED], that would not increase those competitors' respective market shares, or alter the post-transaction market share and concentration statistics presented by USCC.

¹⁷ Joint Opposition at 11. USCC's data on the combined market shares of the two companies is especially significant because the remedy that ALLTEL and Midwest propose would allow the combined company to retain the customers and market shares of both businesses. See *infra*, at 10-11.

To rebut the presumption of harm that arises from such extraordinary post-transaction market share and market concentration statistics, ALLTEL and Midwest once again advance the arguments that ALLTEL advanced to defend the high market shares and high market concentration that would have resulted from its earlier proposed acquisition of Western Wireless—most significantly that partially built out PCS carriers can and will expand and new competitors can and will enter the market to defeat any anticompetitive price increase. As discussed at some length in USCC’s Petition to Deny, however, both the Commission and the Department of Justice rejected these defenses in the context of the ALLTEL-Western Wireless transaction.¹⁸

Of course customer share data is not dispositive. Theoretically, it can occur that existing competitors with small market shares will expand, and new firms will enter the market to defeat an effort by the combined company to raise prices. The question is whether those things can and will occur in southern Minnesota if ALLTEL is permitted to acquire Midwest.

As explained in USCC’s Petition to Deny, in analyzing the effects of the ALLTEL-Western Wireless transaction in rural Kansas and Nebraska, the Commission and the Department of Justice both concluded that they could not rely upon partially built out PCS carriers to expand,¹⁹ or new competitors to enter the market to defeat an anticompetitive price increase by the combined company. ALLTEL and Midwest have not shown that southern Minnesota is different from either Kansas or Nebraska in any material respect, or that there is any other reason

¹⁸ Petition to Deny at 12-16.

¹⁹ ALLTEL and Midwest concede that [REDACTED], Joint Opposition at 3 & 6, a fact relied upon by the Department of Justice in rejecting ALLTEL’s argument that partially built out PCS carriers could expand to defeat an anticompetitive price increase in Kansas and Nebraska. See Petition to Deny at 8-9.

that these defenses should be credited by the Commission in the current proceeding when they could not be credited in the earlier one.²⁰

Nor is this transaction saved by the imaginative arguments raised by ALLTEL and Midwest that [REDACTED],²¹ or that it is acceptable to eliminate competition in rural areas because competition in urban areas will save the day.²² ALLTEL's proposed acquisition of Midwest would be clearly anticompetitive by accepted standards, and the Commission should proceed to consider whether there exists a remedy that would eliminate this anticompetitive effect.

2. The Commission Should Not Permit ALLTEL And Midwest To Design A Remedy Unilaterally.

In their Joint Opposition, ALLTEL and Midwest provide only a brief sketch of their proposed remedy, before urging the Commission to "promptly grant the Transfer Applications."²³ This unilateral, "trust us" approach is completely irregular, of course, and only highlights that a hearing and further Commission investigation are needed.

²⁰ In their Joint Opposition at 11-21, ALLTEL and Midwest also argue that the presumption of harm that arises from the extraordinarily high post-transaction market shares and market concentration statistics in this transaction may be rebutted by a showing of a large number of competitors, competitors' access to investment capital and sunk advertising costs, low penetration rates, access to additional spectrum, brand awareness, and competitors' retail presence. But there is no indication in the Joint Opposition that these factors are present in southern Minnesota to any greater degree than they were present in Kansas and Nebraska. Whatever force these arguments may have from a legal and factual point of view, they were insufficient to save ALLTEL's acquisition of Western Wireless once it became clear that transaction would have produced unacceptably high market shares and high market concentration, and they should not be sufficient here.

²¹ Joint Opposition at 14 ("[REDACTED]").

²² Joint Opposition at 12-13 ("The lesser competitive coverage in the more rural, less densely populated areas ... is not indicative of potential anticompetitive effects.").

²³ Joint Opposition at 2.

First, the details of the proposed remedy are sketchy to say the least. ALLTEL and Midwest propose to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] That is all that ALLTEL and Midwest provide the Commission by way of detail.

But those are not the only details that are necessary to an analysis of this proposed remedy, of course. What do ALLTEL and Midwest mean when they appear to state that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁴ Joint Opposition at 3 (emphasis added).

²⁵ Joint Opposition at 3.

²⁶ [REDACTED]

One thing that can be inferred from this discussion, however, is that ALLTEL intends to keep Midwest's customers, [REDACTED] achieving for ALLTEL immediately upon the closing the eye-popping 70% to 95% market share that ALLTEL and Midwest say is benign and should be acceptable to the Commission.

Neither is this remedy a certain one. ALLTEL and Midwest assert only that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The unilateral approach suggested by ALLTEL and Midwest completely subverts the process and should not be accepted by the Commission. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Parties to the proceeding such as USCC are handicapped in providing meaningful comment on the public interest issues, and the Commission is without the information it needs to make a decision on the applications.²⁷

3. The Remedy Proposed by ALLTEL and Midwest is Demonstrably Insufficient to Protect Competition and Consumers in Southern Minnesota.

While ALLTEL and Midwest have provided comparatively little detail about their proposed remedy, they have provided enough detail for the Commission to conclude that it is insufficient to eliminate the anticompetitive effects associated with this transaction.

²⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The remedy proposed by ALLTEL and Midwest plainly falls short of even “preserving,” let alone “enhancing” competition. By design, the proposed remedy would allow ALLTEL to keep all of its current customers, along with all of Midwest’s current customers. It would allow ALLTEL to keep all of its current employees, along with all of Midwest’s current employees.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Years could pass before meaningful competition would be reintroduced in southern Minnesota.

In short, rather than “preserve and enhance competition” the remedy proposed by ALLTEL and Midwest would ensure instead that ALLTEL would dominate relevant markets in southern Minnesota immediately upon the closing, and continue to dominate them far into the future. This is not a remedy that is designed to maintain competition at the level at which it currently exists, nor could it possibly do so. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ALLTEL and Midwest argue that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Commission has all the remedial authority it needs to ensure that this proposed transaction meets its public interest test.

²⁸ [REDACTED]

²⁹ Joint Opposition at 23 (emphasis added).

[REDACTED]

ALLTEL and Midwest state that their proposed remedy would be sufficient in this case because [REDACTED]

[REDACTED]

[REDACTED]³⁰ This necessarily assumes, however, that the

[REDACTED]

[REDACTED]

[REDACTED]

This essential assumption is open to question, however, and overlooks the central findings of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁰ Joint Opposition at 3. [REDACTED]

³¹ [REDACTED]

³² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

33 [REDACTED]

34 [REDACTED]

35 [REDACTED]

36 [REDACTED]

37 [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The [REDACTED] remedy proposed by ALLTEL and Midwest is clearly insufficient to maintain competition at current levels, and the Commission should reject it.

4. **The Commission Should Require At Least the Divestiture of an On-Going Business In This Transaction, If the Commission is to Approve It At All.**

[REDACTED] both the Department of Justice and the FTC have articulated a strong preference in favor of the divestiture of an on-going business. In addition, where necessary to ensure that the buyer of the divested assets can compete immediately and effectively, the antitrust agencies have said they will require the divestiture of an even broader set of assets, including assets that are used to produce products that are outside of the scope of the relevant product and geographic markets. The Commission should take advantage of this learning and apply it in the current proceeding, as well.

In their policy statements on merger remedies, the antitrust agencies articulate a preference for the divestiture of an “entire business (that is, an on-going, stand-alone, autonomous business, and which may include assets relating to operations in other markets).”³⁸ This on-going business entity should include:

not only all the physical assets, but also the personnel, customer lists, information systems, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product.³⁹

³⁸ FTC Policy at Q. 15. *See also* DOJ Policy at 12 (“The Division favors the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market.”).

³⁹ DOJ Policy at 12.

The agencies prefer the divestiture of an existing, autonomous business unit because it reduces the risks to consumers associated with the merger remedy:

The divestiture of an intact, on-going business generally assures that the buyer of such a package will be able to operate and compete in the relevant market immediately, thereby remedying the likely anticompetitive effects of the proposed acquisition and minimizing the Commission's risk that it will be unable to obtain effective relief.⁴⁰

As some antitrust commentators put it, the "risk of inadequate relief, or the burden of untimely relief, should not be borne by consumers."⁴¹

The agencies recognize that while in some cases an on-going business entity may be "a single plant that produces and sells the relevant product; in other cases, it may be an entire division."⁴² The antitrust agencies view the sufficiency of the divestiture package as an issue of such importance that both have said that they are prepared to seek divestitures of more than an existing business unit if that what is needed to make the divestiture successful.⁴³

In addition, the agencies have said that the divestiture package may also include assets that are used to produce products that are outside of the scope of the relevant product markets, where that is needed to ensure that the divestiture buyer has the product line and scale necessary

⁴⁰ FTC Policy at Q. 15. *See also* DOJ Policy at 12. (An entire business unit "has, in a very real sense, been tested by the market."). In addition, the Department has identified the "speed, certainty, cost, and efficacy of a remedy" as important considerations that underlie the Department's preference for structural, as opposed to conduct relief. DOJ Policy at 7-8. It seems likely that these considerations also support the Department's preference for the divestiture of an existing business, as opposed to the divestiture of only part of an existing business.

⁴¹ Richard Parker and David Balto, "The Evolving Approach to Merger Remedies," Antitrust Report at 4 (May 2000). *See also* Daniel Ducore, "Perspectives from the FTC's Merger Remedies Workshops," Clayton Act Newsletter at 22 (Spring 2003) ("Divestiture of a complete business by one of the parties returns the market most closely to the pre-merger status quo.").

⁴² DOJ Policy at 12, n. 20.

⁴³ DOJ Policy at 14 ("Divesting an existing business entity ... will not always enable the purchaser fully to replicate the competition eliminated by the merger."); FTC Policy at Q. 15 ("There have been instances in which the divestiture of one firm's entire business in a relevant market was not sufficient").

to compete effectively,⁴⁴ and the package may include assets located outside of the scope of the relevant geographic markets. Indeed, the Department of Justice has gone so far as to say that a divestiture of a world-wide business may be necessary even where the transaction creates a competitive concern only in the United States.⁴⁵

The agencies' broad approach to divestiture remedies may be best understood in light of their focus at the remedy phase of a merger investigation, which is different from their focus during their analysis of the competitive effects associated with transaction:

Although the competitive analysis focuses on specific product markets, remedy analysis focuses on what a business needs to be an effective competitor in the relevant market.⁴⁶

Viewed from that perspective, it is clear that "what a business needs" to be an effective competitor may be broader in scope than the set of assets currently making up a business unit, and broader even than the set of assets currently participating in the relevant market that was defined for purposes of a competitive effects analysis.

Finally, while it is true, as ALLTEL and Midwest assert, that the agencies frequently allow the merging parties to choose whether to divest the businesses of the acquiring or the acquired firm, it is clear from the Department of Justice's policy statement that it may be necessary in some circumstances to require the divestiture of the acquired business:

if the divestiture of one firm's assets would not restore competition, then the other firm's assets must be divested. For example, if firm A's productive assets can only operate

⁴⁴ See DOJ Policy at 15, n. 21 ("it may be necessary to give the purchaser ... the right to produce and sell other products ... where doing so permits the realization of scale and scope economies necessary to compete effectively"); DOJ Policy at 14 ("the Division may seek to include a full line of products in the divestiture package, even when our antitrust concern relates to only a subset of those products."); FTC Policy at Q. 19 ("something more than just the assets used in the production, distribution and/or sale of the relevant product may be required.").

⁴⁵ DOJ Policy at 14; see also FTC Policy at Q. 15. ("in *Guinness/Grand Met*, Dkt. No. C-3801, the Commission required divestiture of foreign assets even though the relevant geographic market was limited to the United States.").

⁴⁶ FTC Policy at Q. 19.

efficiently in combination with other assets of the firm, while firm B's productive assets are free standing, the Division likely would require the divestiture of firm B's assets.⁴⁷

All of these policies, developed with the benefit of lengthy, practical experience, should guide the Commission in its determination as to whether there is a satisfactory remedy for ALLTEL's anticompetitive proposed acquisition of Midwest, and what that remedy might be.

5. At a Minimum, Divestiture of Midwest Minnesota Is Needed, If This Transaction Is To Be Permitted To Go Forward At All.

The Commission should conduct a hearing and further fact-finding to determine whether ALLTEL's proposed acquisition of Midwest can be approved at all. In announcing that

ALLTEL and Midwest effectively concede that their proposed transaction is anticompetitive and cannot be approved by the Commission in its present form. The next step is to determine whether there exists a remedy that would ensure that the proposed transaction is in the public interest. At this point in the process, that is far from clear.

a. Rationale for the Divestiture of Midwest Minnesota

In its Petition to Deny, USCC recommended that the Commission should order no less than a divestiture of Midwest's entire Midwest Wireless Communications, L.L.C. subsidiary ("Midwest Minnesota"), in the event that the Commission determined that such a remedy was sufficient and the Commission wished to give its approval to the proposed transaction.

⁴⁷ DOJ Policy at 10, n. 15. For example, in connection with its review of the SBC-Ameritech merger, the Department of Justice required the combined company to divest Ameritech's cellular affiliate in St. Louis, rather than giving the combined company its choice to divest either the SBC or the Ameritech affiliate, because the Ameritech affiliate planned to offer local exchange service to its subscribers as part of a bundle of services, and the Department of Justice wanted to maximize the chance that the purchaser of the divested assets would choose to do the same. See *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, Memorandum Opinion and Order*, 14 FCC Rcd. 14712 (1999) at ¶ 32.

Midwest Minnesota owns Midwest's cellular business throughout southern Minnesota, including Minnesota RSAs 7, 8, 9, 10, and 11 and the Rochester MSA. Midwest Minnesota was formed in 1996 and has operated successfully as a business unit since that time. Even before Midwest Minnesota was formed, the five partnerships that owned most of the assets that were ultimately contributed to Midwest Wireless were operated off a single switch, and operated jointly by a single manager. Soon after Midwest Minnesota was formed and the assets of these partnerships were contributed to it, Midwest Minnesota acquired its B-side cellular business in the Rochester MSA. This business had been operated historically by USCC, which had found that it could not operate it profitably as an "island" separate from Minnesota RSA 11. Midwest Minnesota has thus existed in approximately its present form since 1996, and has operated successfully.

USCC recommended to the Commission that it order no less than a divestiture of Midwest Minnesota because USCC believes that this remedy would advance most successfully the Commission's goal of "preserving and enhancing competition" in the context of the current proceeding. Because Midwest Minnesota has operated successfully as a separate, integrated cellular business for many years, USCC assumes that it could be divested cleanly as a unit, and operated successfully by a divestiture buyer. Further, USCC believes that this is likely to be the only remedy that would maintain the competition that exists today in southern Minnesota.

ALLTEL and Midwest exaggerate when they say that USCC argues that the "divestiture of an entire operation is the only possible remedy ... irrespective of the circumstances," or that "the acquired firm's assets must always be divested."⁴⁸ USCC does not argue these extreme

⁴⁸ Joint Opposition at 23, 26.

positions. Neither does USCC argue that there is any kind of a “general rule in merger cases that parties must divest newly acquired, as compared to long-held, assets.”⁴⁹ Neither does USCC argue that the Commission’s precedents mandate only this approach.

USCC simply argues that the Commission’s authority is broad enough to pursue such an approach when the circumstances require it, and, based on information available to USCC, that the circumstances likely require it here. ALLTEL’s proposed acquisition of Midwest is anticompetitive throughout the region served by Midwest Minnesota. Further, neither the [REDACTED], nor even a divestiture of all of ALLTEL’s existing cellular business in southern Minnesota would be sufficient to remedy these effects.

[REDACTED] there are at least two important reasons why even the divestiture of all of ALLTEL’s existing cellular business in southern Minnesota would be insufficient. First, ALLTEL’s cellular business in southern Minnesota is vastly inferior to Midwest’s business. ALLTEL’s cellular business in southern Minnesota was at the outer edge of the network previously operated by Western Wireless, and Western Wireless did not invest in providing its customers with the highest quality network there. The business changed hands multiple times, most recently in ALLTEL’s acquisition of Western Wireless. Moving this business to a third owner within two years would surely reduce its competitive strength still further. The owners of this business have always struggled to compete with Midwest—and generally did not succeed very well, as evidenced by Midwest’s larger market shares throughout this region. ALLTEL also has only limited assets in Minnesota RSA 11, where Great Western is the A-side cellular licensee. And the information available to USCC indicates that ALLTEL has

⁴⁹ Joint Opposition at 25.

no more than 10 retail storefronts in all of Minnesota RSAs 7, 8, 9, 10, 11 and in the Rochester MSA combined (as compared with Midwest's 120).

Second, as the coverage maps and market share data demonstrate, ALLTEL and Midwest are effectively the only two competitors currently serving large portions of Minnesota RSAs 7, 8, 9, and 10. Wireless telephony is literally a duopoly in many areas in southern Minnesota, with Midwest as the far stronger of the two competitors. At the same time, through what was formerly Western Wireless, ALLTEL has conducted its own business operations in southern Minnesota for years. ALLTEL thus knows the strengths and weaknesses of its own business, including all of the relevant details about relationships with other carriers, vendors and customers. Thus, if ALLTEL were permitted to acquire Midwest and then divest its own operations, ALLTEL would come to have intimate knowledge of literally all of the businesses operating in the market. ALLTEL would at once (1) assume control of Midwest's far stronger network and customer base and all of its relationships, and (2) know everything there is to know about its only other competitor. This combination of circumstances would allow ALLTEL to dominate the market for many years to come.

When a transaction has anticompetitive effects and a divestiture is required, the antitrust agencies frequently allow the combined company a choice, either to divest the business operated by the acquired company or the business operated by the acquiring company. But the agencies don't have to offer the combined company a choice, and they often do not, when the circumstances require the divestiture of one business or the other. Giving the combined company a choice may frequently make sense in situations where there are multiple competitors in the relevant markets. In that situation, the combined company would not come to have intimate knowledge of all of the businesses operating in the market, whichever business the

company decided to divest. Giving the combined company a choice makes no sense in a duopoly market, however, especially in a case such as this, where the acquired business is so much stronger. In the circumstances of this case, a divestiture remedy that is based on the concept of allowing ALLTEL to choose which business it wants to keep is doomed to failure. The Commission is not required to accept this outcome.⁵⁰

Finally, the divestiture of Midwest Minnesota would permit a single entity to continue to operate Midwest's cellular businesses in both the Rochester MSA and Minnesota RSA 11, where residents share a strong "community of interest." The Rochester MSA consists of Rochester and the surrounding Olmstead County. Rochester and Olmstead County are in turn an "island" completely surrounded by Minnesota RSA 11, which includes the counties of Goodhue, Wabasha, Dodge, Winona, Mower, Fillmore, and Houston.

The community of interest between Rochester and Olmstead County on the one hand, and the surrounding counties making up Minnesota RSA 11 on the other, can be demonstrated in several ways. First, the Census Bureau's definition of the Rochester MSA ("Census MSA") has changed since the cellular A and B licenses were allocated. At the time, the Census MSA for Rochester consisted solely of Olmstead County. Now the Census MSA for Rochester consists of Olmsted, Dodge, and Wabasha Counties. As noted above, Dodge and Wabasha are in Minnesota RSA 11. This shows a clear economic connection between Rochester and Minnesota RSA 11.

Second, the community of interest may be demonstrated by the portions of the 2004 Minnesota Trunk Highway Volume Map that are presented in the Exhibit to this Reply. The numbers on this map indicate the average numbers of vehicles that passed the indicated section

⁵⁰ See *supra*, at 18 & n. 46.

of roadway each day during the course of a year. The higher number indicates the average daily total traffic, while the smaller number indicates only heavy commercial traffic. This Exhibit demonstrates that large numbers of vehicles travel on the roadways in all directions to and from Rochester—between Rochester and Cannon Falls (in Goodhue County), Rochester and Lake City (in Wabasha County), Rochester and Winona (in Winona County), Rochester and Preston (in Fillmore County), Rochester and Austin (in Mower County), and Rochester and Dodge Center (in Dodge County). To illustrate with but one example, the Exhibit shows that between 15,500 and 32,000 vehicles can be found each day on the stretch of Route 52 between Rochester and Cannon Falls.

This is not surprising. Rochester is home to significant facilities for IBM and the Mayo Clinic. Many residents who live outside of Olmsted County travel to Rochester in significant numbers. According to Census statistics, for example, 46.7% of the residents of Dodge County work in Rochester, and 32 % of the residents of Wabasha County work in Rochester.⁵¹ The phone book for Rochester includes not only the residents of Olmstead County but also the residents of Dodge, Wabasha and Fillmore Counties. Finally, various “Rochester area” designations include areas outside of Rochester and Olmstead County. The Rochester-Austin-Albert Lea MN Basic Trading Area includes not only Olmstead, but also Freeborn, Dodge, Mower, Fillmore and Wabasha Counties. And the Rochester DMA, which is the primary viewing area for broadcast television stations in the Rochester area, includes not only Olmsted but also Fillmore, Mower, Freeborn and Dodge Counties, as well as neighboring portions of Iowa.⁵²

⁵¹ US Census Bureau, LED Origin-Destination Data Base (2nd Quarter 2002 and 2003).

⁵² DMAs are defined by Nielsen Media Research. See *Broadcasting & Cable Yearbook 2006*.

As noted above, when USCC operated the A-side cellular business in the Rochester MSA as an “island” within Minnesota RSA 11, USCC found that it could not be operated profitably and sold it to Midwest. Any divestiture of assets designed to remedy the anticompetitive effects of this proposed transaction should ensure that the Midwest businesses in the Rochester MSA and Minnesota RSA 11 continue to be operated together.

b. Doubts That Such a Divestiture Would be Sufficient

The prospect that a divestiture of Midwest Minnesota alone would be sufficient to maintain competition in this market is severely undercut by the arguments by ALLTEL and Midwest that Midwest Minnesota “holds no assets other than the spectrum and tower sites used in connection with its Minnesota operations.” According to ALLTEL and Midwest,

Many of the other assets used to provide service in the Overlap RSAs are held by the Midwest parent, including the switching equipment, cell site equipment, interconnection facilities and related agreements, the wireless customers, customer premises equipment, billing systems and other network platforms, roaming agreements, etc.⁵³

ALLTEL and Midwest make these assertions to support their argument that the

[REDACTED]. To the extent these assertions are true, however, they prove only that a divestiture of far more than this one subsidiary would be required, if indeed the Commission can remedy the problems associated with the transaction at all. As noted above,⁵⁴ the antitrust agencies have made clear in their respective policy statements on merger remedies that the divestiture of assets beyond an on-going business unit may be required in some cases. If necessary, the divestiture package may contain assets used to produce products outside the relevant product and geographic markets.

⁵³ Joint Opposition at 24. USCC has never been informed that these assets were transferred from Midwest Minnesota to Midwest, nor has USCC consented to any such transfer.

⁵⁴ See *supra*, at 16-19.

And if no package of assets can be identified that can both be divested successfully and position the buyer to compete immediately and successfully in the market, approval for the transaction must simply be denied.

The Commission must clearly engage in extensive fact finding to determine whether there exists a package of assets that meets these criteria, and what assets those might be. The answer is not to allow the transaction to close with remedy that would not “preserve and enhance competition” and protect consumers.

6. The Commission Should Not Allow Itself To Be Diverted by Arguments that USCC is Self-Interested.

As USCC disclosed in Petition to Deny,⁵⁵ on January 12, 2006, USCC filed an action against Midwest in the Court of Chancery in the State of Delaware to enforce USCC’s long standing (for almost 11 years) contractual right of first refusal to purchase Midwest’s majority interest in Midwest Wireless Communications, L.L.C., and to restrain Midwest from selling that interest to ALLTEL. USCC is properly pursuing its contractual remedies in the Delaware forum.

USCC is not attempting, as ALLTEL and Midwest assert, to “use the Commission’s regulatory process ... to redress USCC’s failed efforts to persuade Midwest to sell Midwest Wireless to USCC.”⁵⁶ Rather, USCC is actively pursuing a vindication of its contractual rights in the Delaware courts, which it of course has every right to do. ALLTEL and Midwest’s assertions are designed merely to divert the Commission’s attention from the real issues in this proceeding. As is frequently the case, the fact that ALLTEL and Midwest resort to such arguments only indicates that they are aware of the weakness in their arguments and position.

⁵⁵ Petition to Deny at 2, n. 4.

⁵⁶ Joint Opposition at 2.

**CONFIDENTIAL INFORMATION
SUBJECT TO FCC PROTECTIVE ORDER
WT DOCKET NO. 05-339**

CONCLUSION

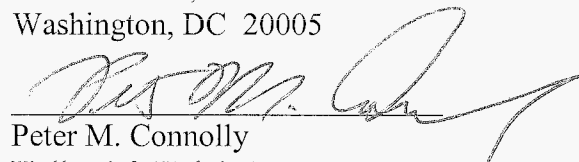
For the foregoing reasons, the above-captioned applications should be denied unless the Commission can determine, through appropriate additional fact-finding, that divestitures will remedy the harms associated with this transaction.

Respectfully Submitted,

UNITED STATES CELLULAR CORPORATION

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March 1, 2006






REDACTED FOR PUBLIC INSPECTION

EXHIBIT

STATE OF MINNESOTA 2004 TRUNK HIGHWAY TRAFFIC VOLUME MAP

PREPARED BY THE
MINNESOTA DEPARTMENT OF TRANSPORTATION
OFFICE OF TRANSPORTATION DATA & ANALYSIS
IN COOPERATION WITH
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

LEGEND

- INTERSTATE TRUNK HIGHWAY 
- U.S. NUMBERED TRUNK HIGHWAY 
- STATE NUMBERED TRUNK HIGHWAY 
- COUNTY SEAT 
- OTHER CITIES AND TOWNS 

NUMBER OF VEHICLES

- A.A.D.T. 10000
[AVERAGE ANNUAL DAILY TRAFFIC]
- H.C.A.D.T. 750
[HEAVY COMMERCIAL A.A.D.T.]

EXPLANATORY NOTES


VOLUMES NEAR CITIES ARE AT CITIES LIMITS.
THE LARGER OF THE PAIRED VALUES ARE
A.A.D.T. THE SMALLER VALUES ARE H.C.A.D.T.

THIS MAP PROVIDES AN OVERVIEW OF TRUNK
HIGHWAY VOLUMES, NOT ALL VOLUMES ARE SHOWN.
FOR COMPLETE INFORMATION GO TO THE
COUNTY AND CITY MAPS ON OUR WEBSITE
WWW.DOT.STATE.MN.US/TDA/MAPS/TRAFFICVOL.HTML

DECLARATION

I, Scott H. Williamson, hereby state, under penalty of perjury, that I am familiar with the factual matters set forth in the foregoing Reply to Joint Opposition, and that except for facts of which the Commission may take official notice, and facts supplied by the cited sources, I believe those facts to be true, complete and correct to the best of my knowledge.

February 28, 2006

A handwritten signature in dark ink, appearing to read "Scott H. Williamson", is written over a horizontal line.

Scott H. Williamson
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Certificate of Service

I, Marianne C. Trana, a secretary in the law firm of Holland & Knight LLP, do hereby certify that true copies of the foregoing "Reply" were sent to the following by first-class United States mail this 1st day of March, 2006.

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